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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO._____

MAJOR BECTON, STANLEY BECTON, ROBERT JONES, ROBERT POLLACK, VINCENT DAMION and BARRY MIROJNICK,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

THE SOLE ISSUE PRESENTED BY THIS CAUSE IS JURISDICTIONAL:

WHETHER UNDER THIS COURT'S DECISIONS IN *BURKS v. UNITED STATES* AND *ABNEY V. UNITED STATES*, A CRIMINAL DEFENDANT MAY TAKE AN INTERLOCUTORY APPEAL OF A DOUBLE JEOPARDY CLAIM, WHERE, IN SPITE OF THE FACT THE EVIDENCE ADDUCED AT TRIAL AGAINST HIM WAS INSUFFICIENT AS A MATTER OF LAW, THE TRIAL COURT DENIED HIS MOTION FOR JUDGMENT OF ACQUITTAL AND THE JURY WAS UNABLE TO REACH A VERDICT?

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NO. _____

MAJOR BECTON, STANLEY BECTON, ROBERT JONES, ROBERT POLLACK, VINCENT DAMION and BARRY MIROJNICK,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Major Becton, Stanley Becton, Robert Jones, Robert Pollack, Vincent Damion and Barry Mirojnick, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause on December 18, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported at 632 F.2d 1294 and is printed as Appendix "A" hereto.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on December 18, 1980. A timely Petition for Rehearing *en banc* was denied April 27, 1981 (a member of that Court having requested a poll for reconsideration *en banc*), the issuance of the mandate having been stayed on May 13, 1981, pending application for review by this Court, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 22 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment (Double Jeopardy Clause):

> . . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

Federal Rules of Criminal Procedure, Rule 29(a):

> . . . The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction for such offense or offenses.

STATEMENT OF THE CASE

These six Petitioners were tried on a three count indictment[1] for conspiracy to import [21 U.S.C. § 960], con-

1. Appellant Stanley Becton was not indicted on Count 2 (conspiracy to possess with intent to distribute marijuana).

spiracy to possess [21 U.S.C. § 869] and possession with intent to distribute marijuana [21 U.S.C. § 841]. The cause was tried to a jury and at the close of the Government's case all Defendants moved for judgment of acquittal pursuant to Rule 29(a), F.R.Cr.P., on the ground that the Government had adduced insufficient evidence to support a conviction as to any of the three counts. The trial court granted a judgment of acquittal as to Count 1 (conspiracy to import), but denied same as to Counts 2 and 3 (conspiracy to possess and possession with intent to distribute).

After approximately "16 hours of deliberation, three notes indicating the jury believed itself unable to reach a verdict, and an *Allen* charge from the Court, a mistrial was declared by the trial court *sua sponte*".[2] Petitioners' several renewed motions for judgments of acquittal were overruled [Vol. 5, p. 88, l. 11-25; pp. 105, l. 21; p. 106, l. 15; p. 115, l. 5-9 and 15].

Upon being put to retrial, Petitioners timely filed a Motion to Dismiss for Prior Jeopardy on the ground that the trial court's denial of Petitioners' Motions for Judgment of Acquittal was erroneous in that the evidence was legally insufficient to support a finding of guilty as to the remaining Counts 2 (conspiracy to possess) and 3 (possession with intent to distribute) with respect to each of the Defendants.

An interlocutory appeal to the Court of Appeals was dismissed in an opinion holding that petitioners must await exposure to a second trial and conviction, if any, to review the sufficiency of evidence adduced by the

2. The jury foreman reported the last vote was 8 to 4 for acquittal on the conspiracy count [Vol. 5, p. 112, l. 10-12] and 11 to 1 for conviction on the possession count [Vol. 5, p. 112, l. 13-14].

Government in the first trial which ended when the jury was unable to reach a verdict. *U.S. v. Becton* (5th Cir. 1980) 632 F.2d 1294, 1394. In dismissing the appeal below the Fifth Circuit stated:

> "It should be borne in mind that we do not confront the issue of reviewability; it is not an open question in this circuit that precisely this issue [sufficiency of evidence at the first trial] is subject to review on appeal from a second conviction, should one occur. *United States v. Wilkinson*, 601 F.2d 791 (5th Cir. 1979)." *U.S. v. Becton, supra*, p. 1296.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *BURKS V. UNITED STATES* AND *ABNEY V. UNITED STATES* AS WELL AS THE DECISIONS OF OTHER COURTS OF APPEALS.

The straightforward teaching of *Abney v. U.S.*, 431 U.S. 651 (1977) and *Burks v. U.S.*, 437 U.S. 1 (1978), is that the Constitution guarantees that no person may be twice put to trial where legally insufficient evidence is offered at the initial proceedings. In *Burks* this Court specifically held that the government may not put a defendant to trial a second time where an Appellate Court has ruled that the evidence was legally deficient in the first trial. And in *Abney* the Court mandated the establishment of procedures for permitting interlocutory appellate review of double jeopardy claims, in order that an accused will not be "forced to endure a trial that the Double Jeopardy Clause was designed to prohibit," pp. 794-5.

Had Petitioners' Motions for Judgment of Acquittal been granted in the first place the Double Jeopardy Clause would have precluded retrial of any defendant on any count.

And had the Petitioners been convicted and the Appeals Court reversed on sufficiency grounds the Double Jeopardy Clause would likewise bar retrial. *Burks v. U.S.*, 437 U.S. 1 (1978).

In fact the Court below held that on double jeopardy grounds[3] the sufficiency of evidence may be reviewed on appeal even though a mistrial was declared after the "jury failed to reach a unanimous verdict". *U.S. v. Becton, supra,* p. 1296. It requires however, that Petitioners must await exposure to a second trial and conviction, if any, to process that appeal, p. 1296. See also: *U.S. v. Rey* (5th Cir. 1981) 641 F.2d 222, pp. 225-6.

What the Court below holds Petitioners cannot achieve by interlocutory appeal, it admits can be accomplished on appeal after a second trial.

> "It should be borne in mind that we do not confront the issue of reviewability; it is not an open question in this circuit that precisely this issue is subject to review on appeal from a second conviction, should one occur." *U.S. v. Becton, supra,* p. 1296.

At least one other Circuit appears to be in accord with this anomalous result, suggesting a defendant "will be free to raise the double jeopardy issue on appeal, in the event that the [subsequent] trial results in conviction".

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3. The Fifth Circuit relied upon *U.S. v. Wilkinson* (5th Cir. 1979) 601 F.2d 791 which was premised exclusively upon the double jeopardy clause, p. 794.

U.S. v. Ellis (4th Cir. 1981) 646 F.2d 132, pp. 135-6, Murnaghan, J., concurring.[4]

However, *Abney v. U.S., supra,* unequivocally established the right of the defendant to have his double jeopardy challenge reviewed by the Appellate Court "*before* a subsequent exposure to (retrial) occurs", p. 662.

Put another way, if the Double Jeopardy Clause entitles a defendant to appeal the sufficiency of evidence in a trial resulting in a hung jury on appeal from a subsequent conviction, then same should be reviewable by interlocutory appeal on Double Jeopardy grounds under *Abney*.

PURPOSES OF "DOUBLE JEOPARDY CLAUSE" UNDERMINED BY REQUIRING RETRIAL BEFORE APPELLATE REVIEW OF "SUFFICIENCY" IN THE FIRST TRIAL

One of the underlying purposes of the Double Jeopardy Clause is to prevent the prosecution from taking a second bite at the apple solely to supply evidence it failed to produce at the first proceeding. In *Burks v. U.S.*, 437 U.S. 1 (1978) this Court noted that "[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceedings". *Burks v. U.S., supra,* p. 11; *U.S. v. Wilkinson, supra,* p. 794;

4. Judge Murnaghan there suggests:
"I doubt that we should or would decline to rule on the double jeopardy question, and in the interests of preserving formality at the expense of substance, require the defendant to go through the ordeal of another trial, well knowing that any conviction would, on appeal, be reversed." *U.S. v. Ellis, supra,* p. 136.

Hudson v. Louisiana, ____ U.S. ____, 101 S.Ct. 970 and n.5 (February 24, 1981). And that is precisely what the government has already stated it intends to do if Petitioners are retried: offer additional evidence and testimony against these defendants [Vol. 5, p. 95, l. 10-12 and p. 96, l. 17-21].

Where the Government "has been given one fair opportunity to offer whatever proof it could assemble" and their "case was so lacking that it should not have even been *submitted* to the jury" then it would appear "the purpose of the [Double Jeopardy] Clause would be negated were we to afford the Government an opportunity for the proverbial 'second bite at the apple' ". *Burks v. U.S., supra*, pp. 15-16.

The other reason most often advanced for the Double Jeopardy Clause it that it precludes much more than double punishment; it "is a guarantee against being twice put to trial for the same offense" forcing the defendant "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense", *Abney v. U.S.* 431 U.S. 651, p. 661 (1978); *Dunberly v. Hogan* (2nd Cir. 1978) 579 F.2d 141.

> "The underlying idea . . . is that the state . . . should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Abney v. U.S., supra*, pp. 661-2; *Green v. U.S.*, 355 U.S. 184, pp. 187-8 (1957).

The Supreme Court in *Abney* went on to hold that to require an accused to be retried and to "run the gauntlet"

a second time before an appeal could be taken would undermine these very aspects of the guarantee's protection. *Abney v. U.S., supra,* p. 662.

ABNEY AND *COHEN* REQUIREMENTS FOR INTERLOCUTORY APPEAL MET

The Court below suggests that the sufficiency issue does not meet one of the requirements for interlocutory review set out in *Abney* and *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949) in that it is "in no sense collateral to the merits, but . . . precisely directed to them". *U.S. v. Becton, supra,* p. 1297.

However, in *Abney* this Court actually held that under *Cohen* the order sought to be appealed need only be "collateral to, and separable from, the principle issue at the accused's *impending* trial". (emphasis supplied) *Abney v. U.S., supra,* p. 659; *U.S. v. McDonald,* 435 U.S. 850, p. 859 (1978).

Here, the Government has stated it intends to offer substantially different and more extensive evidence at Petitioners' "impending" trial, than it had at their first trial. Petitioners' appeal on *Burks* grounds focused on the Government's authority to compel that second impending trial. That appeal sought to review, not the likely merits of the *second* trial, but the Constitutional sufficiency of the *first* trial's evidence. Such review concerns issues collateral to and separable from the merits of the upcoming second trial. See: Alexander, *Interlocutory Appellate Review of Double Jeopardy Claim:* A Method for Testing Evidentiary Sufficiency After a Non-Final Criminal Proceeding, Texas Bar Journal (January 1981), 11, p. 14.

Moreover, it does not appear that this Court in *Abney* was suggesting that the particular double jeopardy claim there presented was one subject to interlocutory review under *Cohen,* but that *all* double jeopardy claims by their "very nature" are collateral to and separable from the central issue of guilt in the "impending" trial.

> "Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the 'small class of cases' that *Cohen* has placed beyond the confines of the final - judgment rule . . . the very nature of a double jeopardy claim is such that it is collateral to, and separable from the principle issue at the accused's impending criminal trial." *Abney v. U.S., supra,* p. 659.

NO REQUIREMENT OF PRIOR COURT DETERMINATION OF INSUFFICIENCY

The fact that "there has been no determination [evidentiary] insufficiency by any court", *U.S. v. Becton, supra,* p. 1295, has not precluded two circuit courts of appeals from allowing interlocutory appeal of the sufficiency of evidence after reversal and remand on other grounds. *U.S. v. United States Gypsum Co.* (3rd Cir. 1979) 600 F.2d 414; *U.S. v. Jelsma* (10th Cir. 1980) 630 F.2d 778.

> "The Appellants . . . appeal from the denial of their . . . motion for judgments of acquittal on the ground of insufficiency. . . . If the defendants are correct that the evidence tendered at the first trial was insufficient to support a conviction, retrial would sub-

> ject them to double jeopardy. . . . Consequently, they may appeal the denial of their motion at this juncture, under the 'collateral order' exception to the final judgment rule." *U.S. v. United States Gypsum Co., supra,* p. 416.

The defendants in *U.S. v. Gypsum* and *Jelsma* had one more determination of the evidence's sufficiency [the jury's] than did the Petitioners in the instant case, with no intervening appellate determination to the contrary.

There is no logical reason why Petitioners should be any worse off because this jury hung than if the jury had improperly convicted.

FEAR OF APPEALS FROM RULE 29 MOTIONS UNWARRANTED

The Court below also suggested that if sufficiency of evidence was reviewable by interlocutory appeal prior to a second trial, then it might likewise be "reviewable . . . by giving notice of appeal when the motion [for judgment of acquittal] was first denied, at the close of the government's case". *U.S. v. Becton, supra,* at p. 1296.

However, the double jeopardy clause does not entitle a Petitioner to review every sufficiency determination or denial of motion for judgment of acquittal. Instead, it precludes "exposure" to a subsequent trial and therefore arises only upon a motion to dismiss, when and if the government seeks to retry a defendant. Had the government not sought to reprosecute petitioners and require them to again "run the gauntlet", they would not be seeking this review.

2. POLICY REASONS OF JUDICIAL ECONOMY AND PRESERVATION OF THE INDIVIDUAL'S CONSTITUTIONAL RIGHTS WARRANT REVIEW.

JUDICIAL ECONOMY

The result of the opinion below is to require two trials with the attendant costs in judicial time and expense of empanelling two juries and requiring the attendance of witnesses and the taking of testimony not once but twice. Furthermore, the Appellate Court will still be required to review two records on appeal should the second trial result in a conviction. There is no savings; and there exists under this procedure the potential for an unnecessary jury trial in the event the subsequent appeal reveals the evidence at the first was insufficient.

INDIVIDUAL'S CONSTITUTIONAL RIGHTS

More importantly, the resulting procedure requires appellants "to endure a trial the Double Jeopardy Clause was designed to prohibit". *Abney v. U.S., supra,* p. 662. If on appeal of the second trial it is determined that the evidence was insufficient at the first trial, then regardless of the relief from any consequence of that subsequent conviction, the Petitioners have been required to suffer the very harm the Double Jeopardy Clause was designed to prohibit; being twice put on trial for the same offense.

3. THE ISSUE AS HERE PRESENTED IS RIPE FOR REVIEW.

Unlike the situations presented in *Hanigan v. U.S.,* No. 80-1650 (March 9, 1981) where the issue had been

rendered moot because the Petitioners there had already been put to retrial [See: Brief of Solicitor General p. 3], or in *Kuhn v. U.S.*, No. 80-1715, cert. den. 49 L.W. 3906, where a prior withdrawn Court of Appeals opinion had already determined the petitioners' first trial was sufficient to support a conviction [See: 629 F.2d 1087-1088], in the instant cause the Court of Appeals has stayed any retrial pending application for review by this Honorable Court and has expressly refused to ". . . consider at this time the sufficiency of the evidence at the first trial". *U.S. v. Becton, supra,* p. 1297. The issue here is ripe for consideration.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to the United States Attorney for the Southern District of Texas and the Solicitor General, Washington, D.C., on this the 26th day of June, 1981.

GERALD H. GOLDSTEIN

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Major BECTON, Stanley Becton, Robert Jones, Robert Pollack, Vincent Damien and Barry Mirojnick,
Defendants-Appellants.

No. 80-1630

UNITED STATES COURT OF APPEALS
Fifth Circuit

Dec. 18, 1980

Defendants, whose trial on drug charges resulted in hung jury and consequent declaration of mistrial took interlocutory appeal from denial by the United States District Court for the Southern District of Texas, at Galveston, Hugh Gibson, J., of motions for acquittal and to dismiss on grounds of former jeopardy. The Court of Appeals, Gee, Circuit Judge, held that Court of Appeals lacked jurisdiction to consider interlocutory appeal which, though in form asserting former jeopardy, in fact raised only denial of motion to acquit.

Appeal dismissed.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

GEE, Circuit Judge:

This expedited appeal presents two issues, a jurisdictional one of broad interest and importance, and an evidentiary one of interest to the appellants only. Since the need for us to consider the latter depends on how we resolve the former, we discuss it first.

Appellants' trial on drug charges resulted in a thoroughly[1] hung jury and the consequent declaration of a mistrial. Motions for judgment of acquittal at the close of the prosecution's case, renewed after the jury's discharge, were partly granted but in main denied. When the remaining counts were set for retrial, appellants renewed their motions for acquittal and further moved to dismiss on grounds of former jeopardy, asserting that the evidence produced against them at their prior trial had been insufficient to warrant submission of the case to the jury. It is the denial of these motions that they bring to us.

Appellants' argument—and an appealing one it is—runs that had they been convicted, and had their conviction been reversed on appeal for insufficiency of supporting evidence, they could not have been again put to trial. This is correct. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). How then, they assert, can it be that where, as here, the evidence was so entirely insufficient as to produce a hung jury rather than a conviction, a retrial is yet permissible? When the prosecution's case is on, and the evidence is insufficient, why should a defendant be worse off if the jury hangs than if it improperly convicts? Stated as an abstract proposition, the argument by analogy seems unanswerable.

---

1. To the degree of an *Allen* charge and three notes attesting to its deadlock.

There are important differences between the case presented here, however, and the proposition stated; and the two apparent parallels are not really parallel at all. In the case posed of a reversed conviction, we contemplate a final decision, entered in the course of appellate review, that the prosecution has had its chance to make a case for the jury and has failed to do so. *Burks,* cited above, stands for the proposition that after such a determination by the appellate judges, the Fifth Amendment forbids a second trial, regardless of whether the defendant sought one, just as it would have had the trial judge made the same determination, refused to submit the case to the jury, and therefore necessarily entered judgment of acquittal.

[1] Here there has been no such determination of insufficiency by any court, trial or appellate. Instead we contemplate a contrary determination by the first trial court—that the evidence *was* sufficient to warrant submission to the jury—and a mere refusal by the jury to convict. Such a refusal is an action in no wise the necessary equivalent of a decision, even by the jury, that the evidence is insufficient to warrant submission. In the first place, of course, the jury is neither equipped nor asked to make such a determination. In the second, it is a commonplace that juries can refuse to convict even on substantial evidence of guilt, while to the contrary judges are not to acquit unless the government has clearly failed to produce evidence supporting a conviction when viewed most favorably to the prosecution. *Burks, supra* at 16-17, 98 S.Ct. at 2149-2150. What the appellants seek instead, is a determination by us now—on this interlocutory appeal before their retrial—that the evidence at the first trial was insufficient to warrant sub-

mission and that the trial judge erred in denying their motions for acquittal. This is new ground.

The procedural vehicle which brings this appeal before us is *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). There the Court decided that inferior appellate courts possess jurisdiction under the rubric of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), to entertain appeals from pretrial orders denying dismissal on double-jeopardy grounds. The nub of the decision is that the Double Jeopardy Clause forbids a second *trial*, not merely a second conviction. In addition, however, the Court held that another claim for dismissal made in the same motion was not reviewable, one urging insufficiency of the indictment. In so holding, the Court laid it down generally that, to be appealable under the *Cohen* rubric, claims for dismissal other than on double jeopardy grounds must themselves meet the requirements of the *Cohen* exception. Bearing the lessons of *Burks* and *Abney* in mind, we turn again to our case.

Although in form the question presented here is that of denial of a motion asserting former jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial. They argue that these should have been granted, since the evidence there was insufficient to support a jury submission, and that had they not been erroneously denied, no succeeding trial would have been permissible. Thus, we contemplate just such a "thinly disguised attempt to turn this [*Abney*] appeal into a plenary review of his first trial" as the Second Circuit rebuffed in *United States v. Klein*, 582 F.2d 186 (1978). We conclude we must do likewise.

[2] It should be borne in mind that we do not confront the issue of reviewability; it is not an open question in this circuit that precisely this issue is subject to review on appeal from a second conviction, should one occur. *United States v. Wilkinson*, 601 F.2d 791 (5th Cir. 1979). Instead the issue is one of appealability: whether we have jurisdiction under *Cohen* and *Abney* to review at this time the decision denying the motions for acquittal at the first mistrial.[2] And if it is presently reviewable under *Cohen*, we see no apparent reason why it would not have been likewise reviewable under *Cohen* by the giving of notice of appeal when the motion was first denied, at the close of the prosecution's case in the first trial, thus halting the trial process—in the absence (perhaps) of a finding of frivolousness. See *United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980) (en banc). Moreover, if it is possible to take an interlocutory appeal by means of making a double-jeopardy claim grounded on any trial error or errors which it can be asserted should have resulted in an acquittal at the first trial—erroneous admission of a great body of severely damaging evidence, for example—we view the prospect of piece-meal appeals with a vengeance. We do not believe that *Cohen* and *Abney* require such a result. At all events, we do not believe that we should press those decisions to such lengths unless they ineluctably demand it.[3]

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2. No complaint is made of the declaration of a mistrial. Nor could one well be made, the jury having been hopelessly hung and the *Perez* standard of "manifest necessity" therefore satisfield. *United States v. Perez*, 22 U.S. 579, 580, 9 Wheat. 579, 580, 6 L.Ed. 165 (1824).

3. We recognize that *Wilkinson, supra*, opines in dicta that the decision is interlocutorily appealable. 601 F.2d 791, at 795. That panel did not confront the issue as we do, however, and was not called on to struggle with it as we have. We are not bound by dicta,

[3] Among the *Cohen* factors, reiterated in *Abney*, is the requirement that the decision sought to be appealed "was not simply a 'step toward final disposition of the merits of the case [which would] be merged in final judgment,'" *Abney v. United States*, 431 U.S. 651, 658, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651 (1977), quoting *Cohen, supra* 337 U.S. at 546, 69 S.Ct. at 1225. A motion for judgment of acquittal is no more than a motion for directed verdict. Such motions are in no sense collateral to the merits, but are precisely directed to them. They are in fact just such steps toward their final disposition as the Court concluded did not justify a *Cohen* appeal in its language quoted above. In short, though the other *Cohen* factors are arguably present here, that discussed above is not. *Cohen* is a narrow exception, applicable to a "small class" of claims which meet all, not merely some, of its factors. 337 U.S. 541, at 546, 69 S.Ct. at 1225. The class which we contemplate here is not a small one. Rather, it comprises all criminal trials in which a motion to acquit for insufficiency of evidence is made and denied. One of *Cohen's* factors is not present here. We therefore lack jurisdiction to consider this appeal which, though in form asserting former jeopardy, in fact raises only the denial of the motion to acquit.

In view of our disposition of this issue, we need not consider at this time the sufficiency of the evidence at the first trial. The appeal is

DISMISSED.

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even of our own court. *Bruce v. Estelle*, 536 F.2d 1051, 1059 n.5 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977). And though we accord it the greatest deference and persuasive force, mature consideration has convinced us that we should not follow it here. Dicta of the Supreme Court are, of course, another matter.

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No. 80-2189

In the Supreme Court of the United States

OCTOBER TERM, 1980

MAJOR BECTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners claim that they should be allowed to take an immediate appeal from the district court's denial of their motion to dismiss the indictment on double jeopardy grounds after the jury at their first trial was unable to reach a verdict.

1. Petitioners were named in a three-count indictment charging them with conspiracy to import marijuana, in violation of 21 U.S.C. 960 (count one); conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (count two); and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (count three). At the close of the government's case, the district court granted petitioners' motion for a judgment of acquittal on count one, but denied the motion as to the other two counts. When the jury was unable to reach a

verdict, the district court granted a mistrial. The court subsequently denied petitioners' renewed motions for a judgment of acquittal (Pet. 2-3).

When the case was set for retrial, petitioners moved to dismiss the indictment on double jeopardy grounds, claiming that the evidence adduced by the government was legally insufficient and that the district court erred when it denied their motions for a judgment of acquittal. The district court concluded that the evidence was sufficient and denied petitioners' motions. After the dismissal motions were denied, petitioners attempted to take an interlocutory appeal to the court of appeals (Pet. App. A-2 to A-3).

The court of appeals dismissed the appeal (Pet. App. A-1 to A-6). The court noted that, when a mistrial is ordered and the case is set for retrial, the evidence presented to the jury has not been found to be legally insufficient by the district court. Accordingly, there is no determination of evidentiary insufficiency that would bar a retrial. The court of appeals also observed that petitioners' appeals were in substance appeals from the denial of their motions to acquit during their first trial (Pet. App. A-3 to A-4). Such a denial, the court noted, is not immediately appealable under *Abney* v. *United States*, 431 U.S. 651 (1977). Instead, motions to acquit are "just * * * steps toward [the] final disposition" of the case and denials of such motions do not satisfy the requirements for interlocutory review (Pet. App. A-6).

2. Petitioners contend (Pet. 4-12) that, under *Abney* v. *United States*, *supra*, they were entitled to immediate appellate review of the district court's pretrial ruling denying their motion to dismiss the indictment. According to their submission, *Abney* requires the court of appeals to decide, before any retrial, whether the evidence presented by the government during the first trial was legally sufficient to sustain a conviction. In the absence of such a determination, petitioners claim, they may not be retried consistent

with this Court's decision in *Burks* v. *United States*, 437 U.S. 1 (1978). For the reasons set forth in the opinion of the court of appeals (Pet. App. A-2 to A-6), on which we generally rely, petitioners' claim is without merit.

In *Abney*, this Court determined that a double jeopardy claim was reviewable on an interlocutory basis. The defendants in *Abney* asserted that, because the original indictment against them had been "duplicitous" and the jury had returned a general verdict of guilty, the jury may have acquitted them on one of the charges contained in the duplicitous indictment while convicting them on the other. They contended that the Double Jeopardy Clause barred their retrial following reversal of their conviction on appeal, in light of this possible "acquittal" by the jury. 431 U.S. at 664.

Abney concluded that this double jeopardy claim was "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." 431 U.S. at 659. The Court emphasized that the "defendant makes no challenge whatsoever to the merits of the charge against him" (*ibid.*). It also observed that the "elements of [the double jeopardy] claim are completely independent of his guilt or innocence" (*id.* at 660). Since the order challenged on appeal was completely "collateral" to the issue of guilt or innocence, and since effective relief could not be afforded on review following final judgment after retrial, the Court approved immediate review.

Abney also held, however, that other claims asserted by the defendant could not be appealed on an interlocutory basis. In particular, this Court rejected the assertion that a defendant in a criminal case is entitled to interlocutory review of a pretrial order sustaining the indictment (*id.* at 663):

> [A]n order denying a motion to dismiss an indictment for failure to state an offense is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial.[1]

The decision of the district court in this case, ruling that the government had presented sufficient evidence to justify a finding of guilt, is a classic example of a pretrial order that "goes to the very heart of the issues to be resolved at * * * trial." Rather than being "completely independent of [the issue of] guilt or innocence," the challenged order relates directly and exclusively to the merits of the prosecution. As the Fifth Circuit recently explained in *United States* v. *Rey*, 641 F. 2d 222, 225 (1981):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *
>
> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

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[1] *Abney* thus reaffirmed the well established rule that a pretrial order that does not meet the standards of a "collateral order," as prescribed in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is not subject to an immediate appeal. This is true even though reversal of the order on appeal would obviate the need for a trial. See, *e.g.*, *United States* v. *MacDonald*, 435 U.S. 850, 860 & n.7 (1978); *Heike* v. *United States*, 217 U.S. 423, 430-431 (1910); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940). Immediate review is not available to test claims that are "enmeshed in the factual and legal issues" to be resolved during the trial on the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 9.

On this basis, the courts of appeals repeatedly have concluded that a "denial of a motion for acquittal is not a final, appealable decision [under *Abney*] even when made after a hung jury mistrial." *United States* v. *Carnes*, 618 F. 2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); accord, *United States* v. *Ellis*, 646 F. 2d 132, 134-135 (4th Cir. 1981); *United States* v. *Young*, 544 F. 2d 415, 416 (9th Cir.), cert. denied, 429 U.S. 1024 (1976). In light of these precedents, the court below correctly dismissed petitioners' appeal from the district court's denial of their motions to dismiss the indictment.[2]

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[2]Petitioners rely on two cases that allowed interlocutory appeals following reversals of convictions. See *United States* v. *United States Gypsum Co.*, 600 F. 2d 414 (3d Cir. 1979); *United States* v. *Jelsma*, 630 F. 2d 778 (10th Cir. 1980). Those cases, however, did not address the mistrial situation presented here. In both cases, the appeals followed closely in the wake of a remand from the court of appeals and after a final judgment of conviction in the district court. Although we question whether those cases were correctly decided, we note that, in those cases, the courts of appeals were in a position to limit the disruption caused by interlocutory review by considering the sufficiency of evidence issue during the first appeal. In the mistrial setting, by contrast, the sufficiency issue will never arise before the court of appeals in conjunction with an appeal from a final judgment. Recognizing a right to interlocutory review of the sufficiency issue in the mistrial context would thus lead to "piece-meal appeals with a vengeance," as the court of appeals warned (Pet. App. A-5). See also *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, slip op. 6, noting that the collateral order doctrine applies only to a "small class" of interlocutory orders, and is a "narrow exception" to the final judgment rule.

If interlocutory appeals were permitted in cases of this kind, the delay introduced in criminal prosecutions would be substantial. In the present case, thirteen months already have elapsed since the district court declared a mistrial and set the case for retrial. Still more time will elapse before this Court can act on the petition for certiorari. Petitioners' attempted interlocutory appeal has thus resulted in substantial disruption of the proceedings in the district court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[3]

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

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[3]This Court recently has denied certiorari in two cases raising the same issue. See *Kuhn* v. *United States*, cert. denied, No. 80-1715 (June 8, 1981); *Hanigan* v. *United States*, cert. denied, No. 80-1165 (Mar. 9, 1981).

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THE UNITED STATES OF AMERICA,
Respondent

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

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Come now the Petitioners, MAJOR BECTON, STANLEY BECTON, ROBERT JONES, ROBERT POLLACK, VINCENT DAMION and BARRY MIROJNICK, and file this Reply to the Government's Memorandum in Opposition to the Petition for Certiorari.

1. CONTRARY TO THE GOVERNMENT'S ASSERTION, THE FIRST TRIAL'S SUFFICIENCY WILL BE REVIEWED BY THE FIFTH CIRCUIT EVEN THOUGH THAT TRIAL RESULTED IN A MISTRIAL AFTER THE JURY HUNG.

In its opposition Memorandum, the Government states that "[I]n the mistrial setting . . . the sufficiency issue will

never arise before the Court of Appeals in conjunction with an appeal from a final judgment". Memorandum in Opposition at p. 5, n. 2 (emphasis added). That is not the law in the Fifth Circuit and Petitioners' dispute with the circuit opinion is not *whether* sufficiency will be tested on appeal but *when*: before or after a second trial.

In its opinion below, the Fifth Circuit expressly stated that although resulting in a mistrial, the sufficiency of the evidence adduced at Petitioners' first trial would be reviewed on appeal from any subsequent conviction, should one occur.

> "It should be borne in mind that we do not confront the issue of reviewability; *it is not an open question in this circuit that precisely this issue (sufficiency of the evidence at the first trial) is subject to review on appeal from a second conviction should one occur.*" (emphasis supplied) *U.S. v. Wilkinson,* (5th Cir. 1979) 601 F.2d 791.

U.S. v. Becton, (5th Cir. 1980) 632 F.2d 1294, 1296.

In *U.S. v. Wilkinson,* the Fifth Circuit made it unmistakably clear that the double jeopardy clause requires that a claim of evidentiary insufficiency at the original trial be reviewed by the appellate court upon appeal from a conviction at the subsequent trial. 601 F.2d at 794. Again, in *U.S. v. Rey,* (5th Cir. 1981) 641 F.2d 222, 225-26, the Fifth Circuit reiterated that:

> "[T]he claimed insufficiency of the evidence at [the] first trial is properly decided only on appeal after any conviction in [the] second trial."

More importantly, the Government avoids the central internal tension in these holdings of the Court of Appeals.

While recognizing that such review is, of necessity, premised upon the double jeopardy clause, the Court below refuses to allow an appeal of that claim prior to retrial, thereby depriving Petitioners of a remedy to cure the very harm the double jeopardy clause was designed to prohibit.

> "[T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." *Abney v. U.S.*, 431 U.S. at 660-61.

This inconsistency makes certiorari even more appropriate.

2. THE QUESTION OF WHETHER A DEFENDANT TRIED ON INSUFFICIENT EVIDENCE MAY BE RETRIED IS "COLLATERAL" TO THE ISSUE OF GUILT, REGARDLESS WHETHER THAT FIRST TRIAL RESULTED IN GUILT, A HUNG JURY, OR A VERDICT OF NOT GUILTY.

The Government's sole point of substance in opposition to the petition for a writ of certiorari is that *Abney* does not apply to the case at hand because Petitioners' insufficiency argument is not a "collateral" issue subject to interlocutory review,[1] citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541.

However, *Abney* does not say that *some* double jeopardy claims meet the *Cohen* test but rather that *all* double jeopardy claims, by their "very nature", are "collateral"

1. This reasoning was also used by the court below. 632 F.2d at 1297.

matters for purposes of interlocutory review. 431 U.S. at 659 (see the Petition at p. 9).

> "[t]he very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial." *Abney v. U.S.*, 431 U.S. 651, at p. 659 (1977).

As pointed out in the Petition (p. 8), once the Government has failed to put on a case, if they were allowed to present other evidence before another jury, the sufficiency of evidence adduced at the first trial would most assuredly be an issue collateral to the impending second trial.

What if the prosecution rested without calling a single witness and the jury deadlocks. Does the Government contend the double jeopardy clause would not preclude retrial?

Rule 29 of the Federal Rules of Criminal Procedure and the Due Process Clause impose a burden on the Government wholly separable from the jury verdict. That includes an obligation implicit in the double jeopardy clause requiring the prosecution to put on its case in the first instance so that an accused will not be forced "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense". *Abney v. U.S., supra,* at p. 661.

One year after *Abney,* this Court handed down its decision in *Burks,* specifically overriding precedent and unequivocally holding that an insufficiency of the evidence at a first trial is a prior jeopardy. Clearly, after *Burks,* insufficiency in evidence removes "the very authority of the Government to hale (a defendant) into court

to again face trial on the charges against him." *Abney v. U.S.*, 431 U.S. at 659.

The question Petitioners wish to pose by interlocutory appeal is not whether they are guilty or innocent, or whether they could be convicted at a second trial, but whether the evidence presented at the first trial was sufficient to justify the submission to the jury.

It is precisely this argument, and the Third Circuit's reliance on *Burks*, that caused the Third Circuit to allow an interlocutory appeal of sufficiency after the Appellate Court had reversed a conviction for trial error. *U.S. v. United States Gypsum Co.* (3rd Cir. 1979) 600 F.2d 414.

3. THE RULING BELOW CONFLICTS WITH OTHER COURTS OF APPEALS.

Petitioners cited *U.S. v. United States Gypsum Co.*, (3rd Cir. 1979) 600 F.2d 414 and *U.S. v. Jelsma* (10th Cir. 1980) 630 F.2d 778 for the proposition that at least two circuits have allowed sufficiency appeals on double jeopardy grounds even though there had been no prior adjudication of insufficiency by judge or jury [Petition at pp. 9-10].

At p. 5, n. 2 of its memorandum in opposition, the Government suggests that these rulings can be reconciled with the decision below because those cases "followed closely in the wake of a remand from the court of appeals and after a final judgment in the district court", while the instant matter involves "the mistrial setting". However, that is a distinction without a difference for constitutional purposes. Both of those decisions were premised on the notion that the double jeopardy clause

requires appellate review of the evidentiary sufficiency of the first trial prior to retrial. It matters not, in terms of the two courts' constitutional reasoning, whether the first trial ended in a hung jury or in a conviction subsequently reversed for trial error. Therefore, the holdings of those circuits conflict with the court below.

Indeed, the present situation involving a mistrial is much closer to *Burks* constitutionally and factually than the situation in *Gypsum Co.* and *Jelsma* where the appellate court reversed for "trial error" and the defendants were faced with one more determination of the evidence's sufficiency [the jury's] than the Petitioners in the instant case, with no intervening appellate determination to the contrary. See *Burks,* 437 U.S. at pp. 14-15.

4. THE GOVERNMENT'S CONCERN WITH ECONOMY IS CONSTITUTIONALLY MISPLACED AND FACTUALLY INCORRECT.

At p. 5, n. 2 of its Memorandum, the Government echoes the concern of the court below that interlocutory review of cases such as this will lead to substantial delays and an avalanche of interlocutory appeals. *See* 632 F.2d at 1296. No proof is offered, and the Solicitor General assumes what is not the case in the Fifth Circuit: that the first trial's sufficiency will not be reviewed.

Such a balancing of equities or concern for economy have previously been rejected by this court in the face of constitutional rights grounded in the double jeopardy clause.

> "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be

> balanced, for the Clause has declared a Constitutional policy, based on grounds which are not open to judicial examination." *Burks v. U.S.*, 437 U.S. at 11, n. 6.

Statistically, few federal criminal trials end in hung juries. And here there is no issue of a waiver of continued jury deliberations, making this an even smaller class of cases.

As noted in the Petition (p. 11), interlocutory review of non-frivolous claims would enhance judicial economy rather burden the courts. Under the procedures announced by the Court below, two trials will be required, with the attendant costs in judicial time and expense of impaneling two juries and requiring the attendance of witnesses and the taking of testimony not once, but twice. Furthermore, the appellate court would still be required to review two records on appeal should the second trial result in a conviction. There is no savings; and there exists under this procedure the potential for an unnecessary jury trial in the event the subsequent appeal reveals the evidence at the first trial was insufficient.

Furthermore, Court of Appeals can follow this Court's guidance in *Abney* and weed out those frivolous double jeopardy claims through the familiar devices of summary calendars and procedures. *See* 431 U.S. at 662, n. 8. The Fifth Circuit has already established such a procedure in *U.S. v. Dunbar*, (5th Cir. 1980) 611 F.2d 985, *en banc*.

In short, if judicial economy is of concern, then since the burden of proof is on the Government, it should, by policy, be encouraged to put on its case the first occasion it is called upon to do so.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioners' Reply to Memorandum in Opposition to the United States Court of Appeals for the Fifth Circuit has been mailed to the United States Attorney for the Southern District of Texas and the Solicitor General, Washington, D.C., on this the _____ day of September, 1981.

GERALD H. GOLDSTEIN